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# Reconciling Human Rights and Supply Chain Management through Corporate Social Responsibility

Kasey McCall-Smith and Andreas Rühmkorf

## I. Introduction

The negative impact on human rights by business activity has been the focus of much academic and public policy debate. In no other field of law has the stubbornness of the public and private law divide been exposed more starkly and with such devastating effects for individuals.<sup>1</sup> Much of the current debate is framed in terms of the intersection between human rights law and Corporate Social Responsibility (CSR), each of which is associated with a distinct legal field, the former with public international law and the latter with private law. In this contribution we aim to identify the primary challenges at the intersection between human rights and business by dissecting specific legal barriers in the public international law and private international law systems. It is intended that by clarifying the most significant barriers in each field, commonalities across the fields will be determined and coordinated responses to overcoming these barriers offered in order to develop a stronger response to human rights abuse by business.

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<sup>1</sup> See, eg S Lagoutte, 'The UN Guiding Principles on Business and Human Rights: A Confusing "Smart Mix" of Soft and Hard International Human Rights Law' in S Lagoutte, T Gammeltoft-Hansen and J Cerone (eds), *Tracing the Role of Soft Law in Human Rights* (Oxford, Oxford University Press, 2016); D Kinley and R Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law' (2006) 6 *Human Rights Law Review* 447.

CSR in global supply chains became a prominent topic in recent years due to recurrent reports of gross human rights violations at resource collection point or supplier factories. The locale where these human rights violations occur are often developing countries whereas the companies that source from these suppliers and sell the end product are usually transnational corporations (TNCs)<sup>2</sup> based in the global North and West. This situation raises questions of legal liability which are linked to a determination of the appropriate duty-bearer, extraterritoriality, and the law applicable to cross-border TNC activities; all of which are addressed from a public and private international law perspective. The legal structure of the businesses involved also plays an important role in this regard. It is commonly recognised that human rights claims have ‘travelled’ into the private law setting as tort claims and criminal actions.<sup>3</sup>

The management of global supply chains is primarily concerned with the planning and organisation of the supply process that ultimately provides the buyer at the head of the chain with the goods or parts that they have ordered so as to maximise efficiency in terms of both delivery and costs. Preventing violations of human rights in those chains is a matter for CSR. This chapter explores the ways in which CSR can reconcile human rights and supply chain management. To that end, it will present the extent to which public and private international law permit the weaving of human rights accountability into global supply chain management and propose how the limits of these two fields could be reconciled. The discussion will be complemented by a case study of the smartphone industry, an area which reports frequent CSR violations in its global supply chains. Following the examination of domestic jurisdictions, specifically the United States (US) and the United Kingdom (UK), the authors argue for the

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<sup>2</sup> Also referred to as ‘multinational corporations’.

<sup>3</sup> On the concept of ‘travellers’, see the [chapter by d’Aspremont and Giglio](#) in this volume.

development of a hybrid regulatory approach to the promotion of CSR, which transcends the limitations of public and private international law in supply chain management.

## II. CSR and Global Supply Chain Management: The Developing Legal Framework

The CSR of TNCs is a much discussed topic due to frequent examples of irresponsible corporate conduct, particularly in global supply chains.<sup>4</sup> There is no agreed definition of CSR, partly due to the longstanding debate about whether or not CSR is purely voluntary or can also be mandatory.<sup>5</sup> Notably, in its 2011 communication on CSR, the European Commission adopted a new definition of CSR as ‘the responsibility of enterprises for their impact on society’.<sup>6</sup> This definition supersedes the Commission’s longstanding definition of CSR as ‘voluntary’ and suggests a more legal slant to CSR that potentially engages both public and private international law.<sup>7</sup> The new definition recognises that CSR can no longer be considered a purely voluntary nor a purely private law consideration because CSR and human rights law overlap in several ways.<sup>8</sup>

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<sup>4</sup> eg International Trade Union Confederation (ITUC), ‘Raising the Floor for Supply Chain Workers: Perspectives from U.S. Seafood Supply Chains’ [www.ituc-csi.org/raising-the-floor-for-supply-chain](http://www.ituc-csi.org/raising-the-floor-for-supply-chain); International Labour Organisation (ILO), ‘Conclusions Concerning Decent Work in Global Supply Chains’ (105th Session, Geneva, May-June 2016); EU Agency for Fundamental Rights (FRA), *Severe Labour Exploitation: Workers Moving within or into the European Union* (Luxembourg, European Union, 2015) 59 et seq.

<sup>5</sup> For a discussion about definitions of CSR, see C Villiers, ‘Corporate Law, Corporate Power and Corporate Social Responsibility’ in N Boeger, R Murray and C Villiers (eds), *Perspectives on Corporate Social Responsibility* (Cheltenham, Edward Elgar, 2008) 91–93.

<sup>6</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility’ COM (2011) 681 final, para 3.1.

<sup>7</sup> European Commission, ‘Green Paper: Promoting a European framework for Corporate Social Responsibility’, COM (2001) 366 final 20.

<sup>8</sup> K Buhmann, ‘Integrating Human Rights in Emerging Regulation of Corporate Social Responsibility: the EU Case’ (2011) 7 (2) *International Journal of Law in Context* 139, 148.

Currently, legal approaches to CSR are widely discussed in the context of global supply chains.<sup>9</sup> This is due to recent examples of human rights violations that gained widespread media attention, including the Rana Plaza building collapse, the Tazreen factory fire and reports about forced labour in the Thai fishing industry and on cocoa farms in West Africa.<sup>10</sup> Another example is the smartphone industry, which is examined below.<sup>11</sup> The supply chain (sometimes referred to as the ‘value chain’) includes all the different parties that contribute to the product that is sold to the customer.<sup>12</sup> It therefore consists of the seller of the end product as well as the manufacturer, retailers, transporters and various sub-suppliers.<sup>13</sup> At the head of the global supply chain is often a Western TNC, ie corporations that ‘are incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates’.<sup>14</sup> Global supply chain operations often reach across multiple countries. The organisation of the supply chain is the domain of the supply chain management, which includes the planning and management of all sourcing, procurement and logistics activities.<sup>15</sup> It also includes coordination and collaboration

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<sup>9</sup> See, eg the recent legislation in this area, discussed below: California Transparency in Supply Chains Act of 2010 (US) and the UK Modern Slavery Act 2015 s54 on transparency in supply chains.

<sup>10</sup> Many NGOs currently monitor and respond to the business impact on human rights, eg Business and Human Rights Resource Centre [www.business-humanrights.org](http://www.business-humanrights.org); CORE at [www.corporate-responsibility.org/about-core](http://www.corporate-responsibility.org/about-core).

<sup>11</sup> See, eg J Wilde and E de Haan, *The high cost of calling: critical issues in the mobile phone industry Labour conditions at mobile phone factories in China, India, Thailand and the Philippines* (SOMO Centre for Research on Multinational Corporations, Report November 2006).

<sup>12</sup> S Chopra and P Meindl, *Supply Chain Management: Strategy, Planning and Operation* 5th edn (Harlow, Pearson, 2013) 13.

<sup>13</sup> *ibid.*

<sup>14</sup> This definition of transnational corporations is used by the United Nations Conference on Trade and Development, [www.unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://www.unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx). Whilst some scholars use the term ‘transnational corporation’ others prefer referring to ‘multinational enterprises’. There is no agreed definition of the term ‘multinational enterprise’. The OECD Guidelines on Multinational Enterprises state that a clear definition was not required for the purpose of the guidelines, but note the following characteristic features: ‘They [multinational enterprises] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed’, see OECD, *Guidelines for Multinational Enterprises* (2011 edition) 17.

<sup>15</sup> For an introduction into supply chain management, see Chopra and Meindl (n 12).

with partners, particularly suppliers. Many examples of gross human rights violations occur in resource extraction projects and supplier factories at the bottom of global supply chains, which are usually based in developing countries. These suppliers are often subcontractors to subcontractors, far removed from the commissioning company at the top of the chain.<sup>16</sup> The public attention focused on human rights violations at supplier factories has made global supply chain management not just an issue of cost saving, but also a reputational concern.<sup>17</sup> ‘Responsible supply chain management’ captures the notion that companies include CSR policies in their supply chain management.<sup>18</sup> Part of this responsible supply chain management is usually the development of a supplier code of conduct by TNCs which they incorporate into their supplier relationships, albeit in different ways and to varying legal effects.<sup>19</sup> These supplier codes of conduct usually impose a variety of socially responsible terms, such as the prohibition of forced labour or anti-bribery policies, on the supplier based on the focus of the TNC at the top of the supply chain.

Critics argue that globalisation enables TNCs to not only diversify and outsource their production, but also their legal liability due to the disjointed relationship between public and private international law.<sup>20</sup> Although CSR is still primarily based on soft law and the voluntary

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<sup>16</sup> See G LeBaron, ‘Subcontracting is Not Illegal, But is it Unethical? Business Ethics, Forced Labor, and Economic Success’ (2014) 20 *Brown Journal of World Affairs* 237, 245.

<sup>17</sup> H Petersen and F Lemke, ‘Mitigating Reputational Risks in Supply Chains’ (2015) 20 *Supply Chain Management: An International Journal* 495.

<sup>18</sup> See M Andersen and T Skjoett-Larsen, ‘Corporate Social Responsibility in Global Supply Chains’ (2009) 14 *Supply Chain Management: An International Journal* 75; see also, the European Commission’s study on responsible supply chains: M van Opijnen and J Oldenziel, ‘Responsible Supply Chain Management, Potential Success Factors and Challenges’ (Brussels, European Union, 2011) [www.foretica.org/wp-content/uploads/2016/01/Study\\_Responsible-Supply-Chain-Management\\_EN.pdf](http://www.foretica.org/wp-content/uploads/2016/01/Study_Responsible-Supply-Chain-Management_EN.pdf).

<sup>19</sup> A Millington, ‘Responsibility in the Supply Chain’ in A Crane, A McWilliams, D Matten et al (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford, Oxford University Press, 2008) 365.

<sup>20</sup> A Sobczak, ‘Are Codes of Conduct in Global Supply Chains Really Voluntary? From Soft Law Regulation of Labour Relations to Consumer Law’ (2006) 16 *Business Ethics Quarterly* 167.

engagement of companies, it has, in recent years, gained a more definite legal dimension.<sup>21</sup> In particular, the home states of TNCs (ie the jurisdictions where TNCs are incorporated) have started to regulate CSR, including supply chain issues.<sup>22</sup> This approach is in line with the recommendations of the UN Guiding Principles on Business and Human Rights<sup>23</sup> (UNGPs) which emphasise the importance of TNC home state regulation.<sup>24</sup> Examples of this developing trend towards home state regulation of CSR include transparency duties such as those in the UK Modern Slavery Act 2015,<sup>25</sup> the 2017 French Due Diligence Law<sup>26</sup> and the California Transparency in Supply Chains Act.<sup>27</sup> In the supply chain context, human rights norms are ‘travellers’ from public international law to private domestic legal systems.<sup>28</sup> Whilst these are positive steps towards reconciling human rights and business through CSR, the lack of understanding of the basis of CSR principles and the function of international human rights law often lead to the failure of such laws. It is to the public international law dimension of CSR considerations that we now turn.

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<sup>21</sup> This is reflected by the increasing literature on CSR from a legal perspective. See, eg the special issue on Legal Aspects of Corporate Social Responsibility (2014) 30 *Utrecht Journal of International and European Law* 1; D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, Cambridge University Press, 2007); R Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context – The Case of Mauritius* (Abingdon, Routledge, 2015).

<sup>22</sup> B Cragg, ‘Home is Where the Halt Is: Mandating Corporate Social Responsibility through Home State Regulation and Social Disclosure’ (2010) 24 *Emory International Law Review* 735, 751.

<sup>23</sup> UN Human Rights Council, UN Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc A/HRC/17/31 (21 March 2011) (UNGPs).

<sup>24</sup> *ibid*, UNGPs, Commentary to Principle 2.

<sup>25</sup> Modern Slavery Act 2015, s 54(1).

<sup>26</sup> Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1).

<sup>27</sup> California Transparency in Supply Chains Act (California Civil Code Section 1714.43) s 3.

<sup>28</sup> See the [chapter by d’Asremont and Giglio](#) in this volume.

### III. The Barriers in Public International Law

Public international law historically has been defined by the subjects to which it applies—states, and states alone.<sup>29</sup> It is worth noting that international law, in its purest form, traditionally excludes those legal issues dealt with by private international law, often referred to as ‘conflict of laws’, as explained in the initial chapters of this volume.<sup>30</sup> This distinction between the two fields is directly linked to the subjects and objects of the laws in each field and to what extent a state may exercise jurisdiction over a breach of those laws. This section highlights the three primary barriers to redress for harmful corporate conduct from the public international law perspective: the limited international legal personality of TNCs; the restraints of extraterritoriality in existing law; and the absence of binding international law applicable to TNCs.

#### A. TNCs and their Limited International Legal Personality

In the last half-century, the traditional public international legal system commenced a slow, but perceptible, migration away from the idea that states are the sole actors with international legal personality.<sup>31</sup> Put simply, the number of international actors active in the international legal system has grown. It began with the recognition of international legal personality in individuals through courts<sup>32</sup> and continued with the creation of binding obligations on states for the benefit

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<sup>29</sup> M Dixon, *Textbook on International Law* 7th edn (Oxford, Oxford University Press, 2013) 117; R Higgins, *Problems & Process: International Law and How to Use It* (Oxford, Clarendon Press, 1995) 12.

<sup>30</sup> See the **Introduction and the chapters in Part I** of this volume.

<sup>31</sup> K McCall-Smith, ‘Tides of Change – The State, Business and the Human’ in R Barnes and VP Tzevelekos (eds), *Beyond Responsibility to Protect* (Cambridge, Intersentia, 2016) 219.

<sup>32</sup> eg *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 PCIJ, Ser B, No 15, the Court held that ‘the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations ...’ 17–18.



of individuals through human rights treaties.<sup>33</sup> The limited, but nonetheless evident, international legal personality of international organisations developed in tandem.<sup>34</sup> International law continues to solidify the expanding cast of actors capable of exercising rights and responsibilities at the international level.<sup>35</sup> Eventually, a private corporation appeared for consideration before the International Court of Justice in the *Barcelona Traction* case.<sup>36</sup> In *Barcelona Traction*, the Court reasoned that the powerful role played by economic actors, such as TNCs, necessitated due account to be taken of these entities at the international level.<sup>37</sup> Though public international law has not granted TNCs full international legal personality, the Court's logic resonates in the twenty-first century struggle with CSR and supply chain management.

How to reconcile the two different objects of public and private international law, individuals and TNCs, is the question that stands as the initial barrier from the public international law perspective. Human rights treaties place a duty on the state to protect individuals by outlining specific positive and negative obligations with which the state party must comply. International Labour Organization (ILO) treaties equally bind states to

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<sup>33</sup> eg International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, 16 December 1966; International Covenant on Economic Social and Cultural Rights, 993 UNTS 3, 16 December 1966.

<sup>34</sup> *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports 174, 178–86, recognised the UN as an international legal actor capable of possessing rights and responsibilities under international law. This idea is reinforced through the capacities granted to international organisations through their various founding treaties as well as bi-lateral treaties they agree with states and treaties they agree across both international organisations and states, eg, the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, UN Doc A/CONF.129/15 (21 March 1986) (not yet in force).

<sup>35</sup> eg the 1982 UN Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982, permits private companies to enter into licensing agreements with the International Seabed Authority; the 1965 Convention on the Settlement of Investment Disputes, 575 UNTS 159, 14 October 1966, art 36 permits '[a]ny Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party'. Private actors are frequently party to international disputes in the area of international economic law, see the **chapters by Noodt Taquela and Daza Clard and Foster** in this volume.

<sup>36</sup> *Barcelona Traction case (Belgium v Spain)* [1970] ICJ Reports 3.

<sup>37</sup> *ibid*, para 39.

obligations for the benefit of individuals in the workplace. At no point do these treaties suggest that TNCs play the duty-bearer role or fall into the protected object category.<sup>38</sup> However, an increasing body of case law delivered subsequent to the drafting of these treaties recognises the link between corporate action and human rights violations, albeit the tying factor becomes the state in order to ensure justice for wronged individuals when direct action against a corporate actor is unavailable under existing law.<sup>39</sup> Courts recognise the positive duty on states to prevent human rights abuse by non-state actors.<sup>40</sup> However, as noted by Mills, treaties are not always directly enforceable and, therefore, the positive duty is contingent on the extent to which the state has implemented its international human rights obligations in the national legal system.<sup>41</sup> In terms of business and human rights, it is a breach of this positive duty which has enabled judgments to redress some of the harm suffered by individuals at the hands of private business, albeit with the state as the defendant and rightfully so where it has been complicit in the breach.<sup>42</sup>

Before the direct accountability of TNCs for human rights abuse can materialise at the international level, as many increasingly demand, the structural deficits in the international human rights system must first be addressed. The previous point regarding the ‘makers’ of international law must here be re-emphasised—states make international law, both private and

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<sup>38</sup> A Grear and BH Weston, ‘The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-Kiobel Lawscape’ (2015) 15 *Human Rights Law Review* 21, 22.

<sup>39</sup> Examples from the European system include: *Taşkin v Turkey* (2006) 42 EHRR 50; *Öneryildiz v Turkey* (2004) 41 EHRR 20; *Lopez Ostra v Spain* (1994) 20 EHRR 277.

<sup>40</sup> See *X and Y v the Netherlands*, Ser A No 91 [1985] 8 EHRR 235; *Velásquez-Rodríguez v Honduras* (Merits), Ser C, No 4, (1988) paras 172–75, the Inter-American Court of Human Rights opined that the failure to prevent harm by a third party triggered the international responsibility of the state; reaffirmed *Ximenes-Lopes v Brazil*, Ser C, No 149 (2006); Case No 55/96, *SERAC and CESR v Nigeria*, 15th Annual Report of the ACHPR [2002] 10 IHRR 282 (2003). See A Nolan, ‘Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: a Comparison of Regional Approaches to the “Obligation to Protect”’ (2009) 9 *Human Rights Law Review* 225.

<sup>41</sup> See the [chapter by Mills](#) in this volume.

<sup>42</sup> Grear and Weston (n 38) 23.

public, thus it is states that must be convinced first and foremost, as otherwise no real changes can begin to take place.

## B. Extraterritoriality

The prohibition of applying national laws or international human rights obligations to conduct outside the jurisdiction of the state has long been viewed as a procedural impediment to addressing human rights abuse abroad, particularly in developing countries.<sup>43</sup> This goes to the heart of the second public international law barrier. The prohibition on the extraterritorial application of national law stems from the principle of state sovereignty, a bedrock principle of public international law as outlined in the UN Charter.<sup>44</sup> If looking at the traditional actors in public international law, both sovereign immunity and the necessity for state consent to jurisdiction tend to silence potential human rights claims yet, when viable, state-to-state claims are brought on the basis of international law breaches in an appropriate forum.<sup>45</sup> An alternative, and more readily used option, is an individual action for breach of a human right at the domestic, regional or international level and thousands of such claims are raised annually, for example, with the European Court of Human Rights.

Even where a limited exception exists to extraterritoriality, this is focused on individuals, not corporate actors.<sup>46</sup> As actors on the international legal plane, TNCs circulate as subjects of private international law yet their conduct has had a marked impact on

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<sup>43</sup> *ibid*, 24. See discussion in the [chapter by French and Ruiz Abou-Nigm](#) in this volume.

<sup>44</sup> Charter of the United Nations, 26 June 1945, art 2(1); see discussion in the [chapters by Mills and d'Aspremont and Giglio](#) in this volume.

<sup>45</sup> A recent example includes the *Jurisdictional Immunities* case (*Germany v Italy, Greece intervening*) [2012] ICJ Reports 99, para 57.

<sup>46</sup> The classic example being for breaches of international criminal law, see Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998.

individuals—individuals who hold rights under public international law by virtue of the international human rights system. If a TNC operating in its home state breaches the rights of an individual in that locus, the individual has the right to access local courts to bring a claim for tortious or criminal conduct, depending on the national laws. When the same TNC engages in the same activity outwith the home state's territory against nationals of another state, the 'foreign-cubed' claim is triggered.<sup>47</sup>

An example of the foreign-cubed claimant is that which the US line of cases starting with *Filartiga* hosted.<sup>48</sup> Liability in *Filartiga* rested on the application of the Alien Tort Statute (ATS),<sup>49</sup> which permits claims to be brought by non-US domiciled individuals for violations of the Law of Nations committed outside the US. Until the 2000s, the ATS was used solely to address tortious behaviour by individuals. However, a series of cases have experimented with the use of the ATS against a corporate actor, such as the infamous example *Kiobel v Royal Dutch Petroleum*.<sup>50</sup> Ultimately, the US Supreme Court concluded that the concept of extraterritoriality could not be ignored with the application of the ATS and that any alleged activity must 'touch and concern' the US in a way that dispels the proscription against extraterritoriality.<sup>51</sup> The Court was, however, silent on the issue of whether a corporate actor is an appropriate defendant in such a claim. The *Kiobel* case and others brought under the ATS

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<sup>47</sup> 'Foreign-cubed' refers to a foreign defendant committing a human rights violation against a foreign plaintiff in a foreign country, see SM Grant and D Zilka, 'The Rise of Foreign Investors in Federal Securities Class Actions' in *Securities Litigation & Enforcement Institute* 2004, 91, 96 (PLI Corp Law & Practice, Course Handbook Ser No B-1442, 2004) as cited in M Steinitz, 'The Case for an International Court of Civil Justice' (2014) 67 *Stanford Law Review Online* 75, 78, n 20.

<sup>48</sup> *Filartiga v Pena-Irala*, 630 F 2d 876 (2d Cir 1980).

<sup>49</sup> Alien Tort Statute, 28 USC § 1350, also often referred to the Alien Tort Claims Act or ATCA.

<sup>50</sup> *Kiobel v Royal Dutch Petroleum Co* 565 US \_\_\_\_ (2013), 133 SCt 1659.

<sup>51</sup> *Kiobel* (n 50) part IV.

present foreign policy challenges to the US as foreign states think that this over-reach of US law could open up foreign government officials to potential civil liability in US courts.<sup>52</sup>

From a human rights approach, the barrier erected by the principle of extraterritoriality is frustrating in terms of what curative measures would satisfy both extraterritorial human rights claims and internal public policy concerns. There are many legitimate reasons for denying claims based on extraterritorial conduct, not the least of which considers the already extensive pressure put on national systems to process the claims of local citizens already before it. Reframing the issue in this way requires prioritisation of human rights claims, domestic versus international, which is precisely what should be avoided in light of the ‘interconnectedness and indivisibility’ of all human rights.<sup>53</sup>

### C. Absence of Hard Law Triggers Soft Law Development

Human rights obligations are set out by treaties at the international and regional levels. As often noted, these instruments, binding as they may be, have variable or ‘manipulable’<sup>54</sup> levels of obligation.<sup>55</sup> This exacerbates the difficulty in formulating human rights ‘rules’ applicable to TNCs. As explained above, TNCs have limited international legal personality and no public international law instrument binds a TNC, though some states are working to develop a treaty

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<sup>52</sup> VG Curran and D Sloss, ‘Reviving Human Rights Litigation After *Kiobel*’ (2013) 107 *American Journal of International Law* 858.

<sup>53</sup> J Donnelly, *Universal Human Rights in Theory and Practice* 2nd edn (Ithaca, New York, Cornell University Press, 2002) 27–33.

<sup>54</sup> Grear and Weston (n 38) 23.

<sup>55</sup> See K McCall-Smith, ‘Interpreting International Human Rights Standards - Treaty Body General Comments as a Chisel or a Hammer’ in Lagoutte et al (n 1); K McCall-Smith, ‘Mind the Gaps: The ILC Guide to Practice and Reservations to Human Rights Treaties’ (2014) 16 *International Community Law Review* 263.

that would do just that.<sup>56</sup> Even with this recognition, public policy does not permit the international community to ignore certain realities when it comes to human rights and business.<sup>57</sup> Globalisation ensures connectivity across the planet by enabling communications, people and business activity to transcend even the most far-afield borders. The connection between human rights and business activity is raised increasingly in international forums.<sup>58</sup> These forums, particularly the UN, deliver a growing body of soft law designed to fill the gaps when harder forms of law, such as a human rights treaty, cannot be agreed or there is little will among states to codify new norms.<sup>59</sup> The following provides an overview of key soft law initiatives currently influencing the human rights and business discourse.

The UN Protect, Respect and Remedy: a Framework for Business and Human Rights<sup>60</sup> (UN Framework) and the subsequently adopted UN Guiding Principles on Business and Human Rights: Implementing the UN ‘Protect, Respect and Remedy’ Framework<sup>61</sup> (UNGPs) offer a roadmap for delegating human rights responsibilities between government and business. Together, the UN Framework and the UNGPs provide a common policy framework from a multi-stakeholder approach and key to three pillars—protect, respect and remedy—is the

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<sup>56</sup> Human Rights Council, ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ UN Doc A/HRC/26/L.22/Rev.1 (26 June 2014); see C Rodríguez-Garavito, ‘Business and Human Rights: Beyond the End of the Beginning’ in C Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge, Cambridge University Press, 2017) 32 et seq; JG Ruggie, ‘A UN Business and Human Rights Treaty?’ An Issues Brief, Harvard University, 28 January 2014.

<sup>57</sup> On public policy, see further the [chapter by Noodt Taquela and Daza-Clark](#) in this volume.

<sup>58</sup> S Deva and D Bilchitz (eds), *Human Rights Obligations of Business* (Cambridge, Cambridge University Press, 2013); S Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Abingdon, Routledge, 2012); A Gatto, *Multinational Enterprises and Human Rights* (Cheltenham, Edward Elgar, 2011).

<sup>59</sup> See the [chapter by Alborno and Collins](#) in this volume; see also, J Cerone, ‘The Taxonomy of Soft Law’ in S Lagoutte et al (n 1); AE Boyle and C Chinkin, *The Making of International Law* (Oxford, Oxford University Press, 2007) 211 et seq.

<sup>60</sup> J Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’, UN Doc A/HRC/8/5 (7 April 2008) (UN Framework).

<sup>61</sup> UNGPs (n 23).

second pillar, which requires business to respect human rights. Under the second pillar, the fundamental requirement for business is ‘to do no harm’.<sup>62</sup> TNCs, under all circumstances, should apply best practice across all operations, including supply chain management, in order to prevent human rights abuse. A growing range of states and international organisations endorse the UNGPs, including the Organisation for Economic Co-operation and Development (OECD)<sup>63</sup> and the International Finance Corporation,<sup>64</sup> both of which adopted policies reflecting the intersection of business and human rights in line with the UNGPs, yet neither oblige businesses to change practices.

The legal strength of the UNGPs comes from the obligation on states to protect human rights by complying with their pre-existing human rights obligations, thus the UNGPs simply reinforce existing international human rights treaties. This necessitates that states strengthen domestic laws to accordingly protect against human rights abuse and ensure redress in the event that TNCs contribute to human rights violations whether directly or indirectly. While this reinforcement of existing commitments is welcomed, it does very little to resolve the barriers of applying public international law due to the limited international legal personality of TNCs and the principle of extraterritoriality. Therefore, the value of the UNGPs must be examined from the perspective of what is most manageable in light of these barriers. Reflecting softer forms of public international law, the UNGPs articulate the key to respect for human rights through a well-understood business and private law term, due diligence.<sup>65</sup> This crossing into

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<sup>62</sup> UN Framework (n 60) para 55.

<sup>63</sup> OECD’s 2011 Guidelines for Multinational Enterprises  
[www.oecd.org/corporate/mne/oecdguidelinesformultinationalenterprises.htm](http://www.oecd.org/corporate/mne/oecdguidelinesformultinationalenterprises.htm).

<sup>64</sup> International Finance Corporation, Policy and Performance Standards on Social and Environmental Sustainability, 1 January 2012,  
[www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC\\_Performance\\_Standards.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afd998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES).

<sup>65</sup> UNGPs (n 23) principle 15(b).

the realm of private law and phraseology that is second nature to TNCs attempts to link public international and private law by clarifying the components to successful human rights due diligence.

Strip away the human rights language of the UNGPs and what is left is transparency, a fundamental component of effective due diligence and a principle that has gained increased attention in public international law due to concerns about the democratic deficit in the international organisations that facilitate most of the contemporary public and private international law development.<sup>66</sup> Greater transparency enables regulators to evaluate the potential or real harm at every level of an operation—across the entire supply chain—whether that activity takes place in the home state or a host state. It is an indispensable tool in bridging the divide between public and private law across several sectors and across the supply chain.<sup>67</sup> The fundamental problem with supply chain management is that traditionally it has been only the bottom line, the final costs that interest a TNC in a competitive global market. Transparency, as set out in soft instruments of public international law, suggests that regulators, and ideally stakeholders, are able to trace every element of a product to its roots and that national laws will mandate social responsibility with the penalty that consumer choices will be altered in relation to the information available or TNCs will suffer business repercussions. These repercussions may reveal themselves in cross-border disputes such as those in the ‘foreign-cubed’ situation introduced above.

In conjunction with the UNGPs and other business and human rights efforts at the international level, a multitude of transparency initiatives have been established, many of

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<sup>66</sup> See, eg A Bianchi and A Peters (eds), *Transparency in International Law* (Cambridge, Cambridge University Press, 2013).

<sup>67</sup> Transparency is also examined in respect of international investment arbitration in the **chapter by Foster** in this volume.



which are industry specific soft law mechanisms. For example, the Extractive Industries Transparency Initiative (EITI) monitors extraction operations in 51 states, including oil, gas and minerals, and suspends compliance certification for states that do not meet articulated EITI standards.<sup>68</sup> The EITI monitoring focuses on the contracts entered into between governments and TNCs, including bilateral investment treaties or home government agreements, to tracing the revenue in order to keep all stakeholders fully apprised of how the state is handling its natural resource income. The EITI does not specifically deal with extraction practices at the most remote end of the supply chain. This reveals the disconnect between top-down and bottom-up supply chain management considerations.

The Public-Private Alliance for Responsible Minerals Trade (PPA) is a recent initiative focusing on supply chain management solutions in relation to conflict minerals, particularly in the most troubled areas of Africa, including the Democratic Republic of the Congo (DRC).<sup>69</sup> It is a multi-stakeholder initiative which includes governments, civil society and corporations and was spear-headed by the US Department of State and US Agency for International Development. Motorola, Nokia and Apple, as well as several communications companies, have joined PPA since its founding in late 2011. The PPA was initiated in direct response to section 1502 of the Dodd-Frank Act,<sup>70</sup> US legislation mandating that companies disclose if they use conflict minerals (eg tantalum) from the DRC or an adjoining country if the minerals are ‘necessary’ to the functionality or production of a product manufactured or contracted to be manufactured by the company. Where companies use such conflict minerals they are required

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<sup>68</sup> Extractive Industries Transparency Initiative, [beta.eiti.org](http://beta.eiti.org).

<sup>69</sup> PPA website, [www.resolve.org/site-ppa/](http://www.resolve.org/site-ppa/).

<sup>70</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, s 1504, Disclosure of payments by resource extraction issuers.

to report about the exercise of due diligence on the source and chain of custody of their conflict minerals, thereby fulfilling the transparency requirement to the best of their ability.

Is transparency alone enough? Though a commendable democratic principle, it has not proved to be a cure all nor is it always desirable in public international law.<sup>71</sup> Furthermore, it is unclear how any negative human rights repercussions resulting from increased transparency monitoring might be addressed by current private international law instruments. Transparency must be coupled with further, tangible legal ramifications to respond to what is revealed by transparency rules. Dodd-Frank and the UK Modern Slavery Act attempt to remedy this to some extent; however, as currently drafted, these transparency requirements do not give any guidance on how to ensure that individual victims are protected or able to access justice, as they are under the private international law regime of the EU, discussed below.

Are soft law initiatives simply too ‘insufficiently compelling’ in terms of real human rights protection?<sup>72</sup> As international discourse and practice continues to expand on these issues, the real test will be the ground level protection of human rights, not the professed uptake of these international soft law instruments. And while soft law may not be sufficiently compelling, it does highlight the tension between the public and private spheres in terms of human rights protection.

## IV. The Barriers in Private International Law

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<sup>71</sup> See AE Boyle and K McCall-Smith, ‘Transparency in International Law-Making’ in Bianchi and Peters (n 66).

<sup>72</sup> Grear and Weston (n 38) 39.

The fact that violations of CSR principles in global supply chains regularly occur at supplier factories in the developing world raises questions about the access to justice of victims. The problem that victims commonly face is that there are often weak legal standards in the countries where the human rights violations occur and/or weak law enforcement mechanisms. From the victim perspective, it is therefore important that they have access to remedies. A particularly important issue in this context is whether the TNC at the top of the supply chain can be held legally liable in tort law, or any other type of law, for the conduct that occurs throughout its supply chain, including factories of suppliers and sub-suppliers.<sup>73</sup> The violation of human rights often also constitutes a tort, for example, where workers are injured due to poor workplace health and safety standards, excessive working hours or forced labour.<sup>74</sup> Whilst gross violations of human rights can also constitute criminal offences, this section will focus on tort due to the scope of this chapter on private international law.<sup>75</sup>

This section will first analyse the applicable law in cases of human rights violations at supplier factories, then turn to the issue of jurisdiction before finally looking at the consequences of the legal structure within global supply chains.

## A. The Applicable Law

With regards to the applicable law, the general principle that is traditionally applied by most legal systems is the law of the place of the tort (*lexi loci delicti*).<sup>76</sup> This concept is linked to the

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<sup>73</sup> See generally M Eroglu, *Multinational Enterprises and Tort Liabilities: An Interdisciplinary and Comparative Examination* (Cheltenham, Edward Elgar, 2008); A de Jonge, *Transnational Corporations and International Law* (Cheltenham, Edward Elgar, 2011) 94.

<sup>74</sup> de Jonge, *ibid*, 94.

<sup>75</sup> Corporate criminal law will briefly be considered below.

<sup>76</sup> D McClean and V Ruiz Abou-Nigm, *Morris: The Conflict of Laws* 9th edn (London, Sweet & Maxwell, 2016) 484.

idea of the territoriality of law, ie that ‘each state has the jurisdiction to regulate the activities taking place within its territorial boundaries’.<sup>77</sup> However, in the context of supply chain liability, transnational tort litigation against the corporation at the head of the chain is an attractive avenue for tort victims, particularly when a remedy in the jurisdiction where the tort has occurred (eg in this context that is usually a developing country world where the supplier factory is located such as Pakistan) is unavailable. Transnational torts claims in the US under the ATS are often referred to by proponents of greater CSR as an example of how countries in the global West and North could impose extraterritorial liability on their companies for human rights violations that occur overseas.<sup>78</sup> However, as mentioned above, following the decision of the US Supreme Court in *Kiobel*, it is uncertain to what extent this statute can be used for international torts litigation against corporations in the future.<sup>79</sup>

In the European Union, the applicable law in claims based on tort law is determined by the Rome II Regulation regarding the conflict of laws on the law applicable to non-contractual obligations.<sup>80</sup> Article 4(1) of this regulation stipulates that the law applicable to non-contractual obligations arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the of the country in which the event giving rise to the damage occurred and irrespective of the countries in which the indirect consequences of that event occur. As an exception to this, Article 4(2) of the Regulation determines that where the alleged perpetrator

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<sup>77</sup> J Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge, Cambridge University Press, 2006) 109.

<sup>78</sup> D McBarnet and P Schmidt, ‘Corporate Accountability through Creative Enforcement: Human Rights, the Alien Torts Claims Act and the Limits of Legal Impunity’ in D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge, Cambridge University Press, 2007) 175.

<sup>79</sup> *Kiobel* (n 50).

<sup>80</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). This regulation is effective since January 2009. It has, by and large, replaced the Private International Law (Miscellaneous Provisions) Act 1995.

of the tort and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs the law of that country applies. Also, where the tort is manifestly more closely connected with a country other than the country in Article 4(1) or (2), then the law of the other country applies.<sup>81</sup>

The challenge that this legal regime in tort law establishes is that the place where the damage occurs is ‘narrowly circumscribed’.<sup>82</sup> Recital 17 of the Rome II Regulation establishes that for cases of personal injury ‘the country in which the damage occurs should be the country where the injury was sustained.’<sup>83</sup> Therefore, the usual situation is that when the tort is committed outside the UK, the applicable law to decide about the merits of the claim for damages will be determined by the law of the place where the damage/injury occurred. In the context of human rights violations at supplier factories this will be the law of the country in which the supplier factory is based, for example Bangladesh. In many instances, the applicable law is not fully developed. Consequently, tort victims in global supply chains must base their claim on the law of the country where the damage/injury occurred. They will therefore not have access to English tort law, which is well-developed, for example, in terms of law relating to workplace injuries. The rules of the Rome II Regulation therefore severely restrict the ability to apply English tort law extraterritorially to human rights violations at overseas factories which supply goods for transnational corporations in the United Kingdom.

As many TNCs commonly incorporate CSR principles such as the prohibition of the use of forced labour into their supply contracts with their overseas suppliers as part of their supply chain management, it is also important to assess under what circumstances these

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<sup>81</sup> Rome II Regulation, art 4(3).

<sup>82</sup> C Clarkson and J Hill, *The Conflicts of Law* 4th edn (Oxford, Oxford University Press, 2011) 265.

<sup>83</sup> See further McClean and Ruiz Abou-Nigm (n 76) 484.

contracts are governed by English law. If the rules of private international law stipulate that the contract is governed by English law, then this might lead to greater promotion of CSR due to the certainty that the established principles of English contract law provide. If an English court hears a contractual dispute in a global supply chain contract involving a UK-based TNC and an overseas supplier, the Rome I Regulation will determine whether English law is applicable.<sup>84</sup> Under this Regulation, the parties have the choice to determine the law that is applicable to their contract.<sup>85</sup> In fact, an analysis of supply chain contracts involving English TNCs has revealed that a choice of law specifying English law as the law governing the contract is regularly included.<sup>86</sup> Contract law disputes regarding the violation of CSR principles in global supply chains of English TNCs are therefore likely to be governed by English law.

## B. Rules of Jurisdiction

Although English tort law is unlikely to be applied to torts that occur at supplier factories far down the supply chain, the chances for the victims of those human rights violations to be awarded compensation might still be better if English courts have jurisdiction to hear the claim. As noted in the previous section, the law applicable to the case may be the law of the country where the tort occurred. Usually the place where the tort occurred, or where the damage occurred, are also connecting factors for the purposes of jurisdiction, ie they constitute ‘bases of jurisdiction’. However, given the difficulty in gaining access to courts in many developing

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<sup>84</sup> (Regulation EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations). Art 2 of the Regulation stipulates that the law specified by the Regulation shall be applied whether or not it is the law of a Member State.

<sup>85</sup> Rome I Regulation, art 3(1). The parties have the autonomy to decide amongst themselves which law should govern them.

<sup>86</sup> See A Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Cheltenham, Edward Elgar, 2015) 85.

countries where supplier factories are situated, for example due to corruption, tort victims might want to bring their claim in English courts. Hence, the analysis that follows focuses on the jurisdiction of the English courts rather than more generally on the different bases of jurisdiction potentially available for the victims.

Four different sets of rules govern the jurisdiction of the English courts. The first is the Brussels regime, comprising the Brussels I Regulation (Regulation 44/2001) regulating proceedings instituted in the courts of Member States of the EU, including Denmark, before 10 January 2015, and the Brussels I *bis* Regulation (also known as the Brussels I Recast) (Regulation 1215/2012)<sup>87</sup> regulating proceedings instituted in the courts of Member States of the EU on or after 10 January 2015. The second is the Lugano Convention, between the Member States of the EU and European Free Trade Association (EFTA), which applies only as between the EU Member States and Iceland, Norway and Switzerland. The 2007 Lugano Convention's text is, for the most part, identical to that of the Brussels I Regulation. The third is the Intra-UK regime,<sup>88</sup> which is another variant of the European rules, based on Chapter II of the Brussels regime, allocating jurisdiction as between different parts of the UK. The fourth set is made up of the English traditional rules of jurisdiction, developed by the judges and now to be found in the Civil Procedure Rules. In civil and commercial matters, that is, within the scope of application of the European regime in this context, the technical basis on which the English courts apply the traditional rules is Article 6 of the Brussels I *bis* Regulation, which allows national law to apply in cases not caught by the other provisions of the Regulation.<sup>89</sup>

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<sup>87</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I *bis*).

<sup>88</sup> See the [chapter by Hood](#) in this volume.

<sup>89</sup> For a further discussion of the variable applicable regimes, see McClean and Ruiz Abou-Nigm (n 76) ch 5.

The analysis that follows, however, is solely based on the application of the Brussels regime, and within this regime, it only analyses the possibilities that this regime presents for bringing the claim before the English courts, rather than a fuller analysis of all the bases of jurisdiction provided for in the Brussels regime for this kind of claims.

Article 4 of the Brussels I *bis* Regulation stipulates that persons who are domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. Domicile for a company is defined by Article 63(1) of the Regulation as the place where the company has its statutory seat, its central administration or its principal place of business. In Article 63(2) it is clarified that in the UK statutory seat means the place where the company has its registered office or, where there is no such office, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place. This rule means that companies incorporated in the UK and/or companies that are effectively run from the UK are to be sued in UK courts. As a consequence of this rule, a foreign subsidiary of a UK transnational corporation will usually not satisfy these requirements and can, therefore, not be sued in English courts based on domicile as a connecting factor. The legal regime established by the Brussels Regulation therefore means that companies that are domiciled in the UK can be sued here, even for conduct that they have done elsewhere. Under the Brussels regime, English courts are not able to stay proceedings on grounds of *forum non conveniens*.<sup>90</sup>

However, courts are able to stay the proceedings in cases where proceedings are pending before a court of a third state at the time when a court in a Member State is seized of an action involving the same cause of action and between the same parties as the proceedings in the court of the third state.<sup>91</sup> The condition for a stay of proceedings in this situation is that

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<sup>90</sup> See discussion in the **chapter by French and Ruiz Abou-Nigm** in this volume.

<sup>91</sup> Brussels I *bis*, art 33(1).



it is expected that the court of the third state will give a judgment capable of recognition and, where applicable, of enforcement in that Member State and if the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. It has been pointed out that companies as potential defendants of lawsuits in the UK might ‘commence proceedings for a declaration of non-liability in the host jurisdiction’.<sup>92</sup> Baughen notes that due to Article 33 of Brussels I *bis* companies are able to ask the court in the UK to exercise its discretion to stay the proceedings based on the fact that they had already commenced proceedings about the same cause of action in a third state (ie, a non-Member State of the EU). Given that it is already difficult to bring a claim against a UK TNC for torts occurring at its supplier factories, this rule restricts those circumstances even further.

Overall, the rules in Brussels I *bis* severely limit the ability of victims of human rights violations at supplier factories to have their tort claims heard at English courts. In most cases, the company that owned the factory where the violation occurred will not be the TNC based in the UK, but a foreign company, either a foreign subsidiary, owned by the UK TNC or a foreign supplier which is completely independent. The jurisdiction for lawsuits against foreign companies, however, lies with the foreign courts where these companies are domiciled as there is no sufficient connection with the UK. Yet, with regards to claims that can be brought against TNCs in the UK, the ability to stay proceedings under Brussels I *bis* further restricts the access to remedies for victims of human rights violations at foreign supplier factories, though, admittedly, some view the discretionary power brought in by the recast regulation as having positive potential.<sup>93</sup>

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<sup>92</sup> S Baughen, *Human Rights and Corporate Wrongs* (Cheltenham, Edward Elgar, 2015) 176.

<sup>93</sup> See chapter by French and Ruiz Abou-Nigm in this volume.

To complete the discussion, we will briefly also refer to choice of court agreements here. Where a dispute arises relating to a CSR obligation imposed on a supplier in a global supply chain contract, English courts, too, have to apply the different regimes referenced above to determine whether or not they can assume jurisdiction. Article 25 of the Brussels I *bis* regulation stipulates that if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. As with the applicable law, an analysis of supply chain contracts involving English companies has revealed that these commonly include a choice of jurisdiction clause (choice of court agreement) outlining that any disputes arising should be heard in English courts.<sup>94</sup>

### C. The Legal Structure of Global Supply Chains

The difficulties that victims of human rights violations in global supply chains experience in bringing tort claims for those violations are further exacerbated by the legal structure of those chains. Due to space constraints, we are unable to fully discuss the legal doctrines that contribute to those difficulties.<sup>95</sup> However, there are two situations that briefly need to be addressed here to complement the picture that we have so far established. Global supply chains

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<sup>94</sup> An example is Rio Tinto's terms and conditions for purchase orders which contains the following clause in s 23(a) Law: 'and the Supplier irrevocably and unconditionally submits to the exclusive jurisdiction of the English courts for all purposes in connection herewith', [procurement.riotinto.com/documents/Purchase\\_Order\\_-\\_UK\\_-\\_London\\_-\\_Goods\\_\(English\)\\_-\\_1April16.pdf](https://procurement.riotinto.com/documents/Purchase_Order_-_UK_-_London_-_Goods_(English)_-_1April16.pdf). Note also the 2005 HCCH Convention on Choice of Court Agreements in force between the EU Member States, Mexico and Singapore.

<sup>95</sup> See A Rühmkorf, 'Global Sourcing through Foreign Subsidiaries and Suppliers: Challenges for Corporate Social Responsibility' in A de Jonge and R Tomasic (eds), *Research Handbook on Transnational Corporations* (Cheltenham, Edward Elgar, 2017) 194–219.

can be organised in a way which includes both foreign subsidiaries of the TNC and/or suppliers and sub-suppliers which are not owned by the TNC at the head of the chain and which are only linked with it through contract.

First, in the context of corporate groups consisting of parent companies and their subsidiaries, it is important to note that there is no group liability within corporate groups in English law.<sup>96</sup> This means that a parent company based (TNC) in the UK is not legally liable for the tort liabilities of its subsidiaries, no matter if these are based in the UK or abroad. In the case *Adams v Cape Industries plc*, the Court of Appeal rejected the idea of vicarious liability of parent companies for their subsidiaries.<sup>97</sup> It dismissed the idea of a single economic unit between the different companies in the group, even in case of a wholly-owned subsidiary. The consequence of this approach is that the TNC as the parent company will not be vicariously liable for the torts committed by its subsidiaries. English law strictly treats parent and subsidiary companies as separate legal entities. The parent company is therefore effectively protected from liability. The only way to make the parent company legally liable in tort law is to establish that it has itself breached a duty of care that it directly owed to the employees of its subsidiaries.

Second, the structure of global production processes has shifted from the traditional parent–overseas subsidiary company situation to a chain of suppliers and sub-suppliers, which are only linked with each other by contract.<sup>98</sup> This shift makes it even more difficult to hold the corporation at the head of the supply chain legally liable as, contrary to subsidiaries, the suppliers and their sub-suppliers are not usually owned by the transnational corporation. This

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<sup>96</sup> See *Adams v Cape Industries plc* [1990] BCLC 479.

<sup>97</sup> *ibid.*

<sup>98</sup> S Cavusgil, G Knight and J Riesenberger, *International Business: The New Realities* 3rd edn (Harlow, Pearson, 2014) 474.

loose structure consisting of wholly independent companies exacerbates the situation from the point of view of providing access to justice for the victims of violations of CSR principles. The rules of private international law, discussed above, will make it difficult to apply English law to such scenarios or for English courts to assume jurisdiction to hear those claims. The law is therefore struggling to catch up with the business realities.<sup>99</sup>

Still, the situation for tort law and contract law differs: whereas current private international law regulation in the EU acts as a barrier to promoting greater corporate social responsibility in global supply chains in tort law, it acts as a facilitator with regards to contract law. However, as the victims of violations of CSR principles at supplier factories do not procure a remedy in contract against the transnational corporation through contractual CSR clauses, the effect of this difference is likely to be limited.<sup>100</sup> The reason is that the enforcement of the contractual CSR obligations imposed on suppliers depends on the transnational corporations themselves.

## E. Summary: The Barriers to Promoting CSR Posed by EU Private International Law Rules

In summary, the European private international law regime is not very conducive to promoting transnational human rights in litigation based on tort law. Jurisdiction and applicable law rules

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<sup>99</sup> Despite the focus of this chapter on English law, it is worth mentioning here that, at the time of writing, there is an ongoing case at the Regional Court of Dortmund against the German textile discounter KIK (*Jabir u a / KiK Textilien und Non-Food GmbH*, LG Dortmund, 7 O 95/15). The company is being sued by the relatives of victims of a factory fire at a Pakistan textile factory. The claim is based on tort law. In this case, the supplier company that ran the factory is not owned by KIK and is therefore not a subsidiary company. However, as KIK was the main buyer from that factory, the claimants' lawyers argue that KIK had joint legal responsibility for the fire and would therefore have to compensate the relatives. The outcome of this decision might start an interesting discussion about the legal responsibility of transnational corporations for the violation of CSR principles at supplier factories.

<sup>100</sup> Rühmkorf (n 86) 102–07.

in the EU regime severely restrict the extraterritorial application of English tort law in respect of violations of CSR occurred abroad. In consequence, victims of CSR violations at supplier factories overseas have to try and get justice in their own countries. Whilst it can be argued that this approach conforms to the territoriality principle of law, it also means that, in practice, the access to justice for the victims of harmful corporate conduct is often limited.

In the absence of a binding international human rights framework on corporations, the consequence of this restrictive approach towards extraterritoriality means that the transnational corporations at the head of the supply chain can operate with significant legal impunity. Consequently, products that are tainted by modern slavery, for example, are often sold without anyone being held liable for this gross human rights abuse. Private international law in its European context therefore falls short of providing effective access to justice, which is, after all, a key principle of the UNGPs that have been adopted by both the European Union and the UK.<sup>101</sup> Civil litigation against transnational corporations for torts in their supply chain therefore faces both serious procedural (private international law rules) as well as structural (corporate structures within groups of companies and networks of suppliers) barriers.<sup>102</sup> And as noted the systemic territorial principle of public international law reinforces and sustains the juridical divisions. These barriers are evident in the case study of the mobile phone industry discussed in the next section.

## V. Case Study of the Mobile Phone Industry

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<sup>101</sup> UNGPs (n 23) part III. The UK published its National Action Plan on the implementation of the Guiding Principles in 2013 (4 September 2013) [www.gov.uk/government/news/uk-first-to-launch-action-plan-on-business-and-human-rights](http://www.gov.uk/government/news/uk-first-to-launch-action-plan-on-business-and-human-rights).

<sup>102</sup> See de Jonge (n 73) 117.

In most cities and towns, locating an individual without a smart phone is by far rarer than the sighting of a smartphone. Smartphones increasingly are integrated into the daily lives of people from every socio-economic background, transcending commonplace economic identifiers associated with poverty. In 2015, 1,423.9 million smartphones were sold worldwide and it is anticipated that this number will rise to over 1,800 million by 2020.<sup>103</sup> In light of the decreasing average price of a smartphone,<sup>104</sup> use of these technological gadgets is becoming more commonplace than not in the West. Rarely, however, is a thought given to the way in which these devices appear in their perfectly designed packages at every other storefront on high streets across the West.

Looking at the resourcing of materials used to create smartphones and the workforce used to assemble them, it is clear that responsible supply chain management has not been the forefront consideration for most of the world's leading brands. Examining the supply chain for smartphones presents a range of CSR red flags: the use of conflict minerals, poor workplace conditions, substandard wages, the use of child labour and e-waste return to developing states are just a few of the issues easily identified.

Since its inception, the smartphone industry has been dominated by a handful of manufacturer/suppliers, including Nokia, Motorola and Apple.<sup>105</sup> Continued success in the markets has been sustained by cost reduction strategies, which inevitably means the movement of manufacturing operations to the developing world.<sup>106</sup> Developing countries often suffer from

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<sup>103</sup> Statista, Number of smartphones sold to end users worldwide from 2007-2015 (in millions of units) [www.statista.com/statistics/263437/global-smartphone-sales-to-end-users-since-2007](http://www.statista.com/statistics/263437/global-smartphone-sales-to-end-users-since-2007).

<sup>104</sup> Statista, Global average selling price of smartphones from 2010 to 2019 (in U.S. dollars) [www.statista.com/statistics/484583/global-average-selling-price-smartphones/](http://www.statista.com/statistics/484583/global-average-selling-price-smartphones/).

<sup>105</sup> SOMO, Briefing Paper: Mobile Connections: Supply Chain Responsibility of 5 Mobile Phone Companies, (September 2008) [www.swedwatch.org/sites/default/files/SOMO\\_Mobile\\_Connections\\_Sept\\_20081\\_0.pdf](http://www.swedwatch.org/sites/default/files/SOMO_Mobile_Connections_Sept_20081_0.pdf).

<sup>106</sup> *ibid*, 1.

a lack of both legal and logistics infrastructure. Foreign direct investment has become crucial to provide support for basic infrastructure and development. This necessity often results in haphazard investment contracts or bilateral investment treaties that give little consideration to the impact on the local population. The smartphone supply chain is undoubtedly complex and very bottom-heavy in that the number of supply chain participants is exponentially larger than the limited number of major manufacturers.<sup>107</sup> Due to space limitations, this chapter will focus on the very bottom tier of the supply chain, the use of minerals mined in conflict areas.

Tin, tantalum and tungsten are three of over 30 minerals found in every smartphone and have been widely acknowledged as conflict minerals that fuel the continued internal conflicts in several African states.<sup>108</sup> Contrary to the claims by many top manufacturers, it is possible to ensure conflict-free minerals in the supply chain. Fairphone, a social enterprise business that started in 2010, works to deliver a transparent account of its suppliers, including the point of origin for minerals contained in its phones. Fairphone works with local conflict-free organisations to ensure that these three minerals, typically sourced from conflict-ridden African states, are certified conflict-free before entering its supply chain. This source-point attention to detail and responsibility takes time, effort and committed manpower, three commitments that the largest smartphone manufacturers have been unwilling to abide—time, effort and manpower delivered by Fairphone, with less than 50 employees.

Fairphone is working to educate consumers on the creation of their phones from the bottom of the supply chain to the end of the life cycle. While Fairphone does not claim to be completely pure in its supply chain and acknowledges that the ills of the supply chain cannot be cured overnight, it has identified ‘literally thousands of social and ecological standards that

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<sup>107</sup> *ibid*, 2.

<sup>108</sup> S Lezhnev and J Prendergast, ‘From Mine to Mobile Phone: The Conflict Minerals Supply Chain’ Report’ (*Enough*, 10 November 2009) [www.enoughproject.org/publications/mine-mobile-phone](http://www.enoughproject.org/publications/mine-mobile-phone).

can be improved in the production of smartphones, and [defined] interventions to gradually address some of them'.<sup>109</sup> By partnering with the Conflict Free Tin Initiative (CFTI) and using Fairtrade certified gold, Fairphone is pushing toward the most responsible and sustainable supply chain in the industry.<sup>110</sup> Due to the potential thousands of suppliers that might contribute to the production of a single smartphone, responsible supply chain management is clearly not straightforward, but that does not mean it is not possible.

At present, responsible smartphone supply chain management relies on voluntary standards due to weak home state regulation or avoidance tactics by large manufacturers that would otherwise be required to report potential conflict mineral associations under laws such as Dodd-Frank.<sup>111</sup> The disjointed home state transparency regulations continue to leave open broad gaps that enable smartphone manufacturers to comply with transparency initiatives without meaningfully addressing supply chain problems relating to conflict minerals or other human rights abuses. With stronger accountability laws in addition to more effective transparency regulation, TNCs at the top of the smartphone supply chain will be compelled to ensure that they adhere to the CSR agenda.

## VI. Towards a Hybrid Regulatory Approach: Transcending the Limits of Private and Public International Law

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<sup>109</sup> Fairphone Fact Sheet [www.fairphone.com/wp-content/uploads/2015/06/Fairphone-factsheet\\_EN.pdf](http://www.fairphone.com/wp-content/uploads/2015/06/Fairphone-factsheet_EN.pdf).

<sup>110</sup> Fairphone [www.fairphone.com/en/2016/06/20/fairphone-2-good-vibrations-with-conflict-free-tungsten-2/](http://www.fairphone.com/en/2016/06/20/fairphone-2-good-vibrations-with-conflict-free-tungsten-2/).

<sup>111</sup> US manufacturers have simply found new mineral suppliers from countries not identified as 'conflict zones' by Dodd-Frank, in order to maintain uninterrupted and unexamined supply chains for the specified minerals.



It is clear that mandatory accountability for human rights violations by TNCs is necessary to redress past abuses and those abuses continually suffered by countless individuals in developing countries.<sup>112</sup> Though protection of human rights and accountability is often viewed as ‘precarious’<sup>113</sup> or ‘elusive’,<sup>114</sup> it need not be insurmountable or considered unobtainable. The current accountability gap has attracted a range of responses over and above those demanded by the soft public international law initiatives previously presented. One suggests that an international court be created expressly to cure access to justice issues and reconcile the connection between business and human rights violations, with claimants being victims of ‘mass torts’ rather than human rights violations.<sup>115</sup> While an international civil court may be a long way off, there are two existing ways in which this gap has been tackled, through the passage of stronger legislation and through progressive judicial interpretation of existing law. Looking at the US and the UK, we have examples of both. Examples of stronger legislation include the Dodd-Frank Act,<sup>116</sup> the Torture Victims Protection Act,<sup>117</sup> and the UK Modern Slavery Act 2015,<sup>118</sup> while the line of cases based on the ATS represent the second approach. Both approaches have positive and negative aspects.

Stronger domestic laws can undoubtedly cure the primary hurdles currently experienced in the crusade to hold TNCs accountable for human rights misconduct. Ensuring appropriate access to justice in the jurisdiction of the misconduct or for foreign victims of abuse in the TNC’s state of incorporation or headquarters would enable many to seek redress where

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<sup>112</sup> Grear and Weston (n 38); J Dine, ‘Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?’ (2012) 3 *Journal of Human Rights and the Environment* 44.

<sup>113</sup> Grear and Weston (n 38) 22.

<sup>114</sup> Dine (n 112) 53.

<sup>115</sup> Steinitz (n 47).

<sup>116</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 USC §53 (2010).

<sup>117</sup> Torture Victims Protection Act, 28 USC §1350

<sup>118</sup> Modern Slavery Act, 2015 Chapter 30.

they otherwise would be left without an avenue along which they might pursue justice. However, this alone will not fully repair the current problems with human rights accountability. National courts are not guaranteed to deliver a universal interpretation of human rights.<sup>119</sup> This is particularly true due to the reinterpretation of human rights violations as private law claims. Commentators have suggested that approaches not employing the language of human rights, a civil tort suit for example, do not fulfil the object of human rights law.<sup>120</sup> This chapter asserts otherwise. Whether under the guise of criminal, tort or some other legal designation, the key must be that individual victims of human rights abuse get access to justice. Streamlining all cases as human rights law breaches is the ideal, but should not any step forward be viewed as progress?

Given the significant obstacles to the promotion of CSR in supply chains in both public and private international law, it is important to develop a framework that overcomes the barriers discussed so far. To that end, we propose a hybrid regulatory system that transcends the limits of private and public international law approach and which will, consequently, help reconcile CSR and supply chain management.<sup>121</sup> In our proposed hybrid approach, different regulatory instruments would work together, including hard law, soft law, public international law, private international law and domestic law. It is argued that due to the myriad of challenges facing responsible supply chain management, it is necessary to rely upon a variety of different regulatory instruments. Both public and private international law present different hurdles for promoting CSR in global supply chains, particularly due to the way extraterritoriality is approached and due to the legal position and structures of the TNCs in those supply chains.

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<sup>119</sup> McCall-Smith (n 55).

<sup>120</sup> Grear and Weston (n 38) 36, 38.

<sup>121</sup> See for a discussion of the term 'hybrid' is discussed in the context of regulation: M Vrieling, C van Montfort and M Bokhorst, 'Codes as Hybrid Regulation' in D Levi-Faur (ed), *Handbook of the Politics of Regulation* (Cheltenham, Edward Elgar, 2011) 35.5.2.

However, it is argued here that it is possible to overcome these limitations without having to change the deeply entrenched doctrine of separate legal personality and the European Regulations regarding applicable law and jurisdiction. Our model would aim to steer the behaviour of transnational corporations through the creative use of domestic laws in the home state of transnational corporations through a combination of extraterritorial corporate criminal liability and more stringent transparency laws.

#### A. The Strategic Use of Home State Regulation

Whilst it is admitted that the international regulation of transnational corporations would have the potential to achieve a more consistent and more coherent approach, no such framework is expected anytime soon. In the absence of such an international approach, small steps of addressing corporate power in the home state can achieve incremental change that leads toward reconciliation of human rights and supply chain management. This would prevent TNCs from merely paying lip-service to CSR, but rather push them to fully integrate CSR into their management strategies. The creative use of home state regulation can help fill the regulatory gaps that global supply chains exhibit in terms of human rights protection. The hybrid approach that we propose is capable of overcoming the three main challenges of the present situation that we identified above: first, the limitations that the absence of binding international human rights duties on corporations; second, the barriers towards extraterritorial civil litigation in the European private international law framework; third, the difficulty of holding transnational corporations vicariously liable in tort for the unlawful conduct of their subsidiaries or their suppliers.

The strategic use of domestic law can particularly rely on corporate criminal law and transparency regulations. The former assertion is based on the model set out in the UK Bribery

Act 2010 which makes the failure of commercial organisation to prevent bribery by a person associated with it a criminal offence.<sup>122</sup> There is no requirement that the bribery occurred within the UK.<sup>123</sup> The offence therefore has an extraterritorial dimension. What is required is that the offending company must be involved in business and be constituted in or carry on business or part of its business in the UK.<sup>124</sup> Whilst it is unclear to what extent this criminal offence encompasses suppliers, it can be argued that regular suppliers are included.<sup>125</sup> Notably, a company has a statutory defence if it can prove that it had adequate procedures in place designed to prevent associated persons from engaging in bribery.<sup>126</sup> The government's guidance expressly mentions due diligence mechanisms as 'adequate procedures' supporting this defence.<sup>127</sup> Due diligence is a key principle highlighted by the UNGPs.

The model of the UK Bribery Act could be used for severe human rights violations in global supply chains such as forced labour, child labour and the exposure to very unsafe working conditions. In fact, it was suggested by some NGOs in the legislative process leading to the UK Modern Slavery Act 2015 that a criminal offence modelled on the Bribery Act should be the legislative choice for addressing modern slavery in global supply chains.<sup>128</sup> However, this proposal was rejected in favour of the transparency clause.<sup>129</sup> The advantage of the approach taken in the Bribery Act is the indirect imposition of due diligence requirements on companies. Whilst the threat of the criminal offence can be seen as the 'stick', the defence of

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<sup>122</sup> UK Bribery Act 2010, s 7(1).

<sup>123</sup> *ibid*, s 12(5): 'An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.'

<sup>124</sup> *ibid*, s 7(5). See also E O'Shea, *The Bribery Act 2010: A Practical Guide* (London, Jordans, 2011) ch 8.

<sup>125</sup> Ministry of Justice, *The Bribery Act 2010: Guidance* (March 2011) 16.

<sup>126</sup> Bribery Act (n 122) s 7(2).

<sup>127</sup> Ministry of Justice (n 125) 16.

<sup>128</sup> Draft Modern Slavery Bill Joint Committee, *Draft Modern Slavery Bill, 5: Supply chains*, para 174, [www.publications.parliament.uk/pa/jt201314/jtselect/jt slavery/166/16608.htm](http://www.publications.parliament.uk/pa/jt201314/jtselect/jt slavery/166/16608.htm).

<sup>129</sup> Modern Slavery Act (n 118) s 54.

due diligence is the ‘carrot’. It could therefore steer corporate behaviour away from the current voluntary and haphazard approach to CSR toward a more consistent, integrated CSR compliance system within a broader responsible supply chain management plan. CSR due diligence is thereby given a more prominent position than it currently has in many corporations. At the moment, TNCs often send mixed messages about their approach to CSR to suppliers. Whereas the purchase department often pushes for short-term and low-cost production, CSR department policies are seen as an additional burden on suppliers.<sup>130</sup> However, the law needs to ensure that companies integrate CSR into their entire supply chain management and do not treat it as an ‘add on’.

The proposed model gives CSR a more prominent standing than it has at present. This approach could overcome the limitations of public and private international law that contribute to the current neglect of CSR in supply chain management. The approach based on corporate criminal liability also touches on an issue discussed throughout the chapter: the idea of extraterritorial laws and jurisdiction. Extraterritorial jurisdiction is jurisdiction over an offence which has no connection with the territory of England or Wales, or other state in which the claim is being made.<sup>131</sup> English courts only deal with conduct that is an offence against English law.<sup>132</sup> They have jurisdiction over those criminal offences committed within the boundary of England and Wales.<sup>133</sup> However, there are examples of extraterritorial jurisdiction being exercised in respect of British citizens for crimes, such as murder and manslaughter, committed in a country or territory outside the UK.<sup>134</sup> The offence established by the Bribery Act is a

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<sup>130</sup> See C Bader, ‘The Bangladesh Factory Collapse: Why CSR is More Important Than Ever’ (*The Guardian*, 7 May 2013) [www.theguardian.com/sustainable-business/blog/bangladesh-factory-collapse-csr-important](http://www.theguardian.com/sustainable-business/blog/bangladesh-factory-collapse-csr-important).

<sup>131</sup> R Card, *Card, Cross & Jones Criminal Law* 21st edn (Oxford, Oxford University Press, 2014) 11.

<sup>132</sup> *ibid*, 8.

<sup>133</sup> *ibid*, 9.

<sup>134</sup> Offences Against the Person Act 1861, s 9.

further example of when the English courts could extraterritorial jurisdiction. There are currently few instances where a state is able to exercise jurisdiction for activity outside the normal territorial limits of its jurisdiction without domestic law specifically crafted to override the extraterritoriality limitations recognised by both public and private international law.

## B. Steps Toward the Hybrid Regulatory Approach

Ultimately, the best approach to reconciling human rights and supply chain management would be a private international law instrument that could effectively deliver a process for dealing with ‘foreign-cubed’ claims by clarifying options of choice of law and forum. Until that time, the following briefly outlines our views for a hybrid regulatory approach that will strengthen CSR in global supply chains. Step one is for home states to implement strict domestic transparency regulation for all TNCs operating outwith the home state. Such transparency regulation must include broad coverage of different types of business actors and mandate reporting in respect to all levels of the supply chain, including the most far-removed supplier. Stricter transparency regulation should also demand a well-defined design, featuring differentiated, clear and measurable reporting requirements and, in particular, binding reporting about the TNC’s due diligence mechanisms, external audits of its supply chain and facts and figures about human rights violations in its supply chain that were detected.

Step two sees the home state imposing a due diligence obligation on all TNCs to protect against human rights abuse at every level of operation and a corresponding right to access remedy in the home state for victims when due diligence failures result in extraterritorial human rights abuse, reflecting international human rights law. Tracking the UN Framework approach to remedy, this could include administrative procedures or other non-judicial procedures in addition to tort liability. Equally, the failure of due diligence mechanisms could lead to criminal

liability, such as in the Bribery Act model. In any case, what is important is that TNCs must no longer be able to avoid liability by purely paying lip-service to due diligence mechanisms without having a coherent and meaningful approach to supply chain due diligence that would significantly reduce the risk of human rights violations in their supply chain. Thus, step two sees public international law norms informing private law claims in the home state.

Step three concerns the actions that TNCs take on the basis of the legal environment created by more stringent transparency regulation, due diligence obligations and corresponding liability potential in their home states. TNCs will need to react to new legal requirements, particularly by establishing supply chain due diligence. TNCs can choose how to meet the requirements of the home state laws, for example, how to incorporate CSR policies into their private supplier relationships (eg in supply chain contracts) and which due diligence procedures to impose on their suppliers. The third step therefore further entrenches the public-private link upon which our hybrid model is built. TNCs can, for instance, choose to incorporate public international soft law standards on CSR issues such as the UN Framework. These non-binding instruments then become binding between the TNCs and their suppliers through the power of contract law. Thus, the hybrid approach builds upon existing opportunities in domestic law to allow public international law to inform regulatory choices and responses thereto.

## VII. Conclusion

Global supply chains have become synonymous with human rights violations. It is apparent that the CSR policies of TNCs have made few improvements in the working conditions in many supplier factories at the bottom of global supply chains. This is due to a number of legal challenges inherent in regulating such chains. Our chapter has sought to outline a legal

framework designed to push for improvement of the all-too-often ineffective CSR instruments in the supply chain management of TNCs.

To that end, the chapter demonstrated that currently public and private international law neither jointly or separately deliver the magic formula in terms of reconciling human rights and supply chain management. Strong, directed cross-border regulation building on existing domestic private law and softer public international law instruments, such as the UNGPs, could overcome some of the barriers identified above. Strengthening transparency regulation does little to serve the immediate interests of victims of human rights violations thus we further outlined the need for clear avenues for access to justice for due diligence failures by TNCs. Upon reflection and multiple iterations of our options, it is clear that further refined private international law rules, tailored to tackle the challenges posed by supply chain management in cross-border cases, could aid promoting CSR via both choice of law rules as well as providing for more adequate bases of jurisdiction in order to provide a better chance for victims to access justice. As set out at the beginning of this chapter, it is the victims that have fallen through the cracks in the law generated by the boundaries of existing public and private international law frameworks. Ultimately, it will take bold legal solutions to redress the current inadequacies of CSR in supply chain management. This chapter has outlined short turnaround approaches based on stronger home state transparency and due diligence regulation. We recognise, however, that ultimately, only a new subject-specific private international law instrument has the potential to overcome the existing public and private international law boundaries and ensure effective CSR and responsible supply chain management that respects and protects human rights.